DAVID A. ROSENFELD, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net

Attorneys for the Charging Parties, COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 9, AFL-CIO, COMMUNICATION WORKERS OF AMERICAL, AFL-CIO and COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, AFL-CIO, CLC

AMY YOUNG
80 Pine Street, 37th Foor
New York, NY 10005
(212) 344-2515
Email: ayoung@cwa-union.org

Attorney for Charging Party, DISTRICT 1, COMMUNICATION WORKERS OF AMERICA, AFL-CIO

LAURENCE GOODMAN
WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Telephone: (215) 656-3600
Email: lgoodman@wwdlaw.com

Attorneys for Charging Parties, COMMUNICATION WORKERS OF AMERICAL, AFL-CIO and COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, AFL-CIO, CLC

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

VERIZON WIRELESS, Respondent. and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case 02-CA-157403

VERIZON NEW YORK INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), VERIZON AVENUE CORP., VERIZON ADVANCED DATA INC., VERIZON CORPORATE SERVICES CORP., VERIZON NEW ENGLAND INC., VERIZON SERVICES CORP. AND VERIZON NEW JERSEY INC., Respondents and COMMUNICATIONS WORKERS OF AMERICA ("CWA"), Charging Party	Case 02-CA-156761
VERIZON PENNSYLVANIA INC., VERIZON SERVICES CORP. AND VERIZON CORPORATE SERVICES CORP., Respondents and COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, AFL-CIO, CLC, Charging Party	Case 04-CA-156043
VERIZON WASHINGTON, D.C. INC., VERIZON MARYLAND INC., VERIZON VIRGINIA INC., VERIZON SERVICES CORP., VERIZON ADVANCED DATA INC., VERIZON SOUTH INC. (VIRGINIA), VERIZON CORPORATE SERVICES CORP. AND VERIZON DELAWARE INC., Respondents and COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, AFL-CIO CLC, Charging Party	Case 05-CA-156053

VERIZON CALIFORNIA, INC. AND VERIZON FEDERAL INC., VERIZON FLORIDA INC., VERIZON NORTH LLC, VERIZON SOUTHWEST INC., VERIZON CONNECTED SOLUTIONS INC., VERIZON SELECT SERVICES INC. AND MCI INTERNATIONAL, INC.,	)	Case 31-CA-161472
Respondents	)	**RESPONSE TO NOTICE TO SHOW CAUSE**
and	)	
COMMUNICATIONS WORKERS OF AMERICA AFL-CIO, DISTRICT 9	)	
Charging Party	)	

(1) The Charging Parties request that this matter be remanded to the Administrative Law Judge for a full hearing. Indeed, the Charging Parties vigorously objected to the stipulation of facts, since it contained no factual information other than the rules themselves. We agree, consistent with the Cross-Exceptions that were filed in this case, that a full evidentiary hearing is needed. We welcome the remand.

The Notice to Show Cause, however, suggests that severance may occur. This is puzzling since all the allegations concern "maintenance of allegedly unlawful work rules or policies." The entire matter should be remanded, including those rules that the ALJ did not find unlawful. If the new standard is to be applied to some rules, it should be applied to all rules as long as the allegation has not been withdrawn.

(2) We are ready to put on evidence.

Charging Parties sought a hearing to put on evidence in their Cross-Exceptions. See Nos. 1, 2 and 65.

We addressed this in our Brief in Support of Cross-Exceptions with the following statement:

> Paragraph 9 of the Joint Stipulation is worthless. It stipulates that "The [Respondents} have maintained and applied the attached Code of Conduct to their employees. The Code of Conduct is made available to employees and is maintained in electronic format." This suggests that employees have no requirement or expectation that they are aware of or read the Code of Conduct. To the extent

the Code of Conduct is "applied" that is ambiguous and meaningless. How many? In what circumstances? All employees? Do they know it is applied? The Stipulation should be rejected until Respondents agree that employees are required to be familiar with the Code, are instructed and trained in the Code and are well aware it is applied and enforced to them.

3. Generally, the challenges to employer rules are "facial" challenges. This means that the rules are currently measured against the standard established in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). That case and subsequent cases make it clear, in judging the lawfulness of rules, the context of the rules is relevant to the Board's consideration. Here, however, in addition to the context of the rules, there is substantial factual evidence that can be adduced, as we discuss below.

In many circumstances, the Board considers "extrinsic" evidence to understand the meaning of documents. The Board is authorized to interpret, for example, collective bargaining agreements. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). In construing such contracts, the Board has long used interpretative tools such as past practice, bargaining history, prior arbitration decisions and other forms of extrinsic evidence. These circumstances arise in many contexts where the Board must interpret documents, including collective bargaining agreements. For example, determining whether a clause in a contract violates section 8(e), determining the lawfulness of a union security clause or hiring hall clause, or determining whether there has been unilateral change in light of the language of the contract. Here, the Charging Parties are only asking to use the same well known interpretative tools to support the case that the language of the rules is overbroad and invalid.

Moreover, the claim that Respondents "maintain" these rules is subject to additional proof. We will show how Respondents "maintain" the rules by making employees aware of the rules, how they make sure employees know they will be and have been enforced, explaining the rules to them. All of this is evidence that Charging Parties will offer in addition to the ambiguous reference to maintaining the rules. These enforcement and maintenance efforts have the effect of making employees overly cautious not to violate rules. The managers are arbitrary and unfair and employees are unwilling to engage in conduct which may violate rules for fear of discipline. See discussion above about Paragraph 9.

Moreover the Code of Conduct refers to other documents. e.g. Employee Resource Group Guidelines, see page 115, VZ Compliance Guideline, See page 116. These are the interpretive tools that need to be part of the record.

4. ***

5. The Charging Parties would present the following evidence with respect to the rules. To the extent that the rules prohibit the use of the company's internet, email and other electronic communication devices for any solicitation, the Board must

balance the employer's interest to maintain production and discipline against the employee's right to engage in Section 7 activities. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Here, we propose to adduce witnesses and documents that will show that use by the employees of the email, internet and other electronic communication devices does not interfere with discipline or production in any respect. Use of the electronic communication devices, as a matter of fact, will not interfere whatsoever with any production, discipline, or any legitimate employer interests. This is a factual matter, not a theoretical legal question. A record needs to be established as to the nature of these communication services and devices and how use by employees for Section 7 activity, including communicating, solicitation or forwarding documents will have no effect upon the business interests of the Respondents. Thus, Charging Parties will argue that employees should have unrestricted access to such communication devices for protected concerted activity.

6. The Charging Parties contend the rule contained in Section 3.4.1 "Prohibited Activities" discriminates based on union activity. This challenges the *Register–Guard*, 351 NLRB 1110 (2007), rule. Once again, there is factual evidence, which will be presented, that will show that employees use the intranet and other communication devices for personal use including group personal use. This will undermine the Respondents' rules that prohibit use for email to contact outside organizations. *See Cal. Inst. of Tech. Jet Propulsion Lab.*, 360 N.L.R.B. No. 63 (2014) (evidence of use of the email). This is a factual matter.

7. The Charging Parties furthermore proposes to present evidence as to how the Respondents have interpreted these rules. We recognize that oftentimes the Board determines the validity of rules as to whether an employee can reasonably interpret them to prohibit Section 7 activity. Whether an employee could reasonably interpret them depends on how the employer views and interprets those rules.

That is, if the employer has interpreted them to encompass Section 7 activity, then it is more likely that employees would so interpret them. We intend to present substantial evidence to show that the employer, through prior discipline, internal memoranda, guidances and other documents and actions, has interpreted the challenged rules and applied the challenged rules in the past to restrict Section 7 activity. If the employer interprets the rules to apply to the Section 7 activity, then necessarily any employee would more likely so interpret them.

We will show moreover that management has interpreted these rules broadly, liberally and expansively. This has the effect of making employees think that conduct will be prohibited by these rules and has the intended effect of chilling and eliminating Section 7 protected activity.

8. The Charging Parties furthermore propose to present evidence that the employees are "covered" at least yearly with respect to

these rules. They are repeatedly reminded of the rule and the Code of Conduct throughout the year. This means that the rules are reviewed with the employees. During the coverage, the employees are not told that these rules are to be interpreted so as not to interfere with Section 7 activities. Nothing is clarified. Employees are cautioned if they have any question they should ask the supervisor thus broadening the meaning of them. Moreover, the Charging Party will establish that when the rules are covered, as well as in other company documents, employees are told that the rules are applied strictly against any activity that might be prohibited. They are told they should interpret the rules strictly to prohibit the conduct described in those rules. By being so advised, employees are forced to interpret the rules broadly to prohibit Section 7 activity and to therefore strictly limit their conduct as to avoid Section 7 activity. This rule of interpretation is provided in company documents and communications, which the Charging Parties intend to present. This goes directly to the concept of "maintenance." The employees are well aware they will be disciplined if they violate any provision of the Code of Conduct.

9. The challenged rules consistently refer to "non-public company information." We will show, once again, through company documents and other evidence that "non-public company information" extends to information about wages, hours and working conditions. We will also show that it extends to information necessary and relevant to a union's ability to organize or represent employees. That is, for example, the Respondents interpret that phrase to include such information as closure of a store, change in product lines that requires training, schedule changes, changes in the nature of the operation that will impact health and safety of employees, additional employment opportunities such as transfers or promotions, changes in staffing and so on. All of these issues relate directly to wages, hours and working conditions because they have an impact ultimately on wages, hours and working conditions. Because the information is considered by the Respondents to be "non-public company information," it could not be disclosed to a union for purposes of bargaining the impact or effect or even the decision. It could not be disclosed as an issue to organize around. It could not be disclosed to support lawful economic activity. Nonetheless, this information is necessary to the extent that a union represents the employees in order to bargain over the decision and impact that such information would trigger. The Charging Parties intend to establish that there are a number of Verizon locations where Unions represent the employees and this information would be necessary and relevant to the Union in its role as the collective bargaining representative. The rules as presently written would prevent employees from giving information to the Union that the Union would need for purposes of bargaining and representation. This, furthermore, makes organizing more difficult because employees would assume the futility of having a union since they cannot communicate basic information to the union that it would need to represent them. They cannot provide information on issues around which workers will organize. A factual record needs to be

made that there are current Verizon locations that are the subject of organizing or where the employees are currently represented.

10. ***

11. The Charging Parties furthermore intend to present evidence that there are non-employees who are regularly assigned to Verizon locations. Thus, the prohibition and the rules with respect to non-employees soliciting violate the Board's decision in *New York, New York*, 356 NLRB 907 (2011).

12. The Charging Parties will present evidence referred to in the rules that furthermore provides context to interpreting these rules. For example, there is a reference to "corporate identity specifications," "compliance guideline" and other documents that will help explain and provide context to the Code of Conduct. In many cases, the Board has made it plain that the context is relevant, and these additional documents referred to in the Code of Conduct are relevant to interpreting the Code of Conduct itself.

13. The Code of Conduct refers, in many cases, to requiring employees to contact the legal department or other departments for interpreting these rules. Charging Parties intend to present evidence that when contacted, these other departments have taken the position that conduct that would be protected by Section 7 is prohibited by the Code of Conduct. This again relates to interpreting the rules.

14. The rules require that employees return Verizon property. The Charging Parties will show that that rule encompasses the Code of Conduct itself and other documents relating to wages, hours and working conditions.

15. Charging Parties will put on evidence that some employees view their right to assist other workers as a core religious right. Thus, the rules interfere with this religious right. ***.

17. There are a many facts that need to be presented in terms of the scope of a remedy. Those factual issues are as follows:

(a) The company holds many group meetings where any notice should be read. Managers often read notices and bulletins to employees. Thus, managers should be required to read any Board notice;

(b) The employer sends regular emails to employees, and any notice should be sent to the employees by email;

(c) The employer has intranet based training and access to employee information. Any notice should be posted on the training or other sites.

(d) The employer posts notices on its intranet, where notices are posted for substantially more than 60 days. Any notice

> should be posted for a period consistent with the employer's practice of posting notices for a long period of time;
>
> (e) There is very substantial turnover of employees, and any Board notice and decision should be mailed to employees in order to guarantee an effective remedy;
>
> (f) There are Verizon work locations all over the country, and the notices should be posted both on the company's intranet as well as in every physical location.
>
> (g) Any notice should have an affirmative statement that Verizon has violated the law.
>
> (h) Any order should be a broad order because of repeated violations of the Act by Respondents.

Brief in Support of Cross-Exceptions, pp. 44-48.

The Charging Parties made this argument to the ALJ, who rejected it and ordered the matter submitted on the so-called stipulated facts over the objection of the Charging Parties.

(3) The Charging Parties propose to introduce additional evidence in light of *Boeing Co.*, 365 NLRB No. 154 (2017). Charging Parties will introduce evidence that there is no or little business justification for any of the rules. They will demonstrate this by proving that the rules have not been enforced uniformly, that management violates the rules, and that the company generally condones and allows violations of the rules. They will show that management engages in the activities covered by the rules in order to accomplish business objectives. They will demonstrate that there is business activity ongoing regularly that is encompassed within each of these rules. They will show that if the company engages in conduct covered by the rules, there can be no business justification to restrict such conduct for employees or other individuals who may not be employees within the meaning of the Act, such as managers, supervisors and so on. Charging Party will produce additional information to support the fact that there is no business justification.

We should point out that precisely this inquiry is invited by *Boeing*. Although our request was framed partially in the context of discriminatory treatment, *Boeing* holds that the employer must demonstrate a business justification for any rules. There can be no such

justification if the rule is ignored, not-enforced, violated by management and generally serves no legitimate purpose. We will show all of that with respect to each f these rules in the context of this employer and its business.

For example, the "Speak Up" language (ALJD pp. 4-5) is ignored because, as a practical matter, workers would consume too much time reporting "suspected and actual violations of this Code." It goes so far as requiring reporting of conduct that "[c]ould … hurt Verizon." Even minor issues would require reporting. So the rule cannot be enforced since it, as broadly written, serves no legitimate business purpose. On the other hand, would complaints or questions about "wages, hours and other terms and conditions" of employment be reportable?

Even assuming that there is some business justification, the Charging Parties will introduce evidence that the employees' Section 7 rights outweigh those business justifications. They will do so by demonstrating the weakness of the business justification, if not the pretextual nature of the business justification, and the strength of the employees' Section 7 rights.

(3) Specifically, with respect to *Purple Communications, Inc.*, 361 NLRB 1050 (2014), Charging Parties will establish that management and employees regularly use "company resurces" including electronic communications for communicating about wages, hours and other conditions of employment. These communications are considered business related. So any use of electronic communications to distribute email attachments, faxing, physical distribution and so on to transmit literature about wages, hours or other conditions of employment" is a form of business literature that is not prohibited by Section 1.66 "Solicitations and Fundraising." Management and employees regularly use these resources because the business can function only if employees communicate through electronic communications using those media.

Employees and managers communicate both favorably and unfavorably about wages, hours and other conditions of emplyment. They do so during work time and non-work time. It is all a form of "business literature."

Additionally, Charging Parties will demonstrate that the rules are enforced discriminatorily and inconsistently. For example, with respect to Section 1.6, they will show that "company resources" are routinely used for the distribution of non-business literature.

Furthermore, they will show that employees have used company resources to distribute "non-business literature" with the authorization of management. Management has also allowed this distribution without specific authorization, even having learned of the distribution. Again Boeing turns the inquiry into whether there is a business justification not necessarily whether there is discrimination. If management and others use "company resources" in what is apparent violation of the rule, the rule can serve no business justification.

Furthermore, Charging Parties will show that information about wages, hours and other conditions of employment is business information, so it is not prohibited by the rule against distribution of "non-business literature." This will become apparent because company resources are used constantly and consistently for transmission about "wages, hours and other conditions of employment" by employees, managers and all others, including even non-employees. Thus, the evidence will show that company resources are used to transmit information about wages, hours and other terms and conditions and that this is considered to be business information.

Charging Parties will then establish that *Purple Communications* was too narrowly decided. They will use this case to establish that given the company's rule and its administration, as well as the practical aspects of the use of company resources, employees routinely and consistently use those resources for communication about "wages, hours and other conditions of employment" during work and non-work time. Thus, *Purple Communications* should be modified to make it clear that when employees are granted access to company resources, including email or other forms of electronic communications, they may use it during work time and non-work time for such communication, unless the employer establishes clear limits on the use of those resources and those limits do not include use with respect to wages, hours and other terms and conditions of employment. Verizon has not chosen to do so.

(4) Since the rules apply to all "company resources," Charging Party will put on evidence about all the existing company resources: email, social media, phones, fax, and all forms of electronic communications since different rules may apply to different company resources. They will put on evidence about non-electronic company resources such as bulletin boards, walls, floors, parking areas, vehicles, equipment, paper, pens, pencils, memoranda etc. Additionally,

Charging Party will put on evidence of all the rules that may affect different groups of employees differently. They will show for example that managers use paper and pens for non-business related purposes thus undermining any business purpose in restricting use of such resources. Our point can be illustrated by a rule which stated that managers and everyone who is not an employee within the meaning of the Act could use company resources for the distribution of non-business literature. There would be no business reason to allow all non-employees within the meaning of the Act but who are employees for all other purposes to use company resources while prohibiting others from doing so.

(6) Charging Parties maintain the Board construed the word "including" in Section 1.8 contrary to well-established case law now 80 years old including authority from the Supreme Court. We will prove that Verizon has interpreted the word "including" to be much broader than just the 6 terms listed. *Boeing* compels the Board to allow the Charging Parties to show that Verizon's business justification makes no sense to limit the confidentiality to just the 6 terms which follow the word "including." That would make no sense since there are many other items of information which Verizon considers covered by "personal employee information." We are sure that Verizon will not contend the information which is "personal employee information" is limited to those terms. If it did it would then be conceding that all other information is not subject to confidentiality. We welcome the opportunity to prove this.

(6) Charging Parties will also introduce evidence showing that the exercise of Section 7 rights is a core religious right protected by the Religious Freedom Restoration Act. 42 U.S.C. §§ 2000bb–2000bb-4.

(7) Charging Parties do not waive their position that Members Emanuel and Ring should be recused.

(8) For these reasons, the Board should remand this case to the Administrative Law Judge for the holding of a hearing. The Charging Parties should be allowed to issue subpoenas duces tecum and ad testificandum and have a full and complete record made based upon the evidence to be presented. The Charging Parties look forward to this opportunity to prove that the Board's

Decision in *Boeing* will be regretted by employers and is unworkable. We ask that the Board issue the remand order promptly.

Dated: December 21, 2018

Respectfully submitted,

AMY YOUNG

LAURENCE GOODMAN
WILLIG, WILLIAMS & DAVIDSON

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
DAVID A. ROSENFELD
Attorneys for the Charging Parties

142045\998274

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 21, 2018, served the following documents in the manner described below:

RESPONSE TO NOTICE TO SHOW CAUSE

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Julie Polakoski-Rennie
Field Attorney
National Labor Relations Board - Region 6
1000 Liberty Avenue
Room 904
Pittsburgh, PA 15222-4111
Julie.Polakoski-Rennie@nlrb.gov

E. Michael Rossman
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
emrossman@jonesday.com

Nicholas Hanlon
CWA Legal Department
District 1 Counsel Office
80 Pine Street, 37th floor
New York, NY 10005
nhanlon@cwa-union.org

Elizabeth Dicus
P.O. Box 165017
Columbus, Ohio 43216-5017
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
eldicus@jonesday.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 21, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler